

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NETWORK APPLIANCE INC,

No. C-07-06053 EDL

Plaintiff,

**ORDER REGARDING NETWORK
APPLIANCE INC'S MOTION FOR
LEAVE TO FILE MOTION FOR
RECONSIDERATION OR, IN THE
ALTERNATIVE, FOR ENTRY OF FINAL
JUDGMENT**

v.

SUN MICROSYSTEMS INC,

Defendant.

NetApp has moved for leave to file a motion for reconsideration of this Court's September 10, 2008 Order Construing Claims with respect to the claims of U.S. Patent No. 7,200,715 and the term "incore root inode" in U.S. Patent No. 6,892,211. In the alternative, NetApp moves for entry of final judgment as to the '715 patent pursuant to Rule 54(b).

Leave to File Motion for Reconsideration

Under Local Rule 7-9, a party moving for leave to file a motion for reconsideration must specifically show: (1) that at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or (2) the emergence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order. While NetApp argues that it met the third requirement, the Court disagrees.

NetApp contends that the Court failed to consider material facts or dispositive legal arguments, but NetApp either failed to timely raise these arguments before the Court's claim construction ruling, or attempts to reargue points that the Court has already considered and rejected. With respect to the Court's conclusion that the claim terms "associating the data blocks with one or more storage blocks across the plurality of stripes as an association" and "the association to associate the data blocks with one or more storage blocks across the plurality of stripes" render the claims of the '715 patent indefinite, the Court applied the standard for indefiniteness set forth in Exxon Research and Eng'g Co. v. U.S., 265 F.3d 1371, 1375 (Fed. Cir. 2001). See Order Construing Claims 54-58. The Court considered NetApp's claim construction arguments and the opinions of its expert, Dr. Ganger. Id. at 56. NetApp's disagreement with the Court's conclusion is not grounds for reconsideration.

NetApp also raises new arguments and presents new evidence on the '715 patent that were not previously argued or presented to the Court. See Homrig Decl. Exs. A and B. NetApp has failed to make the showing required under Local Rule 7-9 for leave to file a motion for reconsideration. This Local Rule is designed to promote the just, speedy and inexpensive (or, at least, less expensive) determination of every action, as required by Rule 1 of the Federal Rules of Civil Procedure. It would be unworkably burdensome, inefficient and unfair for the Court to hear new arguments that could have been made prior to its rulings. Further, a legal argument and supporting evidence purportedly important enough to warrant reconsideration should not be relegated to a footnote in an opposition brief in an attempt to preserve the contention that the Court manifestly failed to consider facts or argument. See NetApp Resp. Br. at 32 n.11 (docket no. 114). Cf. SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("arguments raised in footnotes [in opening appellate briefs] are not preserved"). NetApp's motion for leave to file a motion for reconsideration is DENIED as to the '715 patent.

With respect to the term "incore root inode" of the '211 patent, however, the parties did not propose a separate construction for this term, which the Court construed when it became apparent that was necessary to differentiate between incore and on-disk root inodes. Order Construing Claims 60. Out of an abundance of caution, the Court is willing to consider whether this term

1 requires additional clarification and allow the parties to address this limited issue. The parties shall
2 meet and confer on whether the construction of the term “incore root inode” of the ‘211 patent needs
3 fine tuning, and file a joint letter within two weeks of the date of this order.

4 **Entry of Final Judgment**

5 Alternatively, NetApp moves for entry of final judgment with respect to the ‘715 patent
6 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Court must determine (1)
7 whether there is a final judgment, and (2) whether there is any just reason for delay. Curtiss-Wright
8 Corp. v. General Elec. Co., 446 U.S. 1, 7-8. Rule 54(b) certification is left to the sound discretion of
9 the district court: “Not all final judgments on individual claims should be immediately appealable,
10 even if they are in some sense separable from the remaining unresolved claims.” Id. at 8. Rule
11 54(b) certification resulting in piecemeal appeals is inappropriate in cases that should be given
12 unitary review. See Intergraph Corp. v. Intel Corp., 253 F.3d 695, 699 (Fed. Cir. 2001). Here, the
13 ‘715 patent is one of twenty patents in suit. The Court is tentatively inclined not to advance the
14 entry of final judgment on the ‘715 patent, thereby allowing multiple appeals. If NetApp wishes to
15 raise this issue, however, it may file a motion to be heard on a normal schedule.

16
17 **IT IS SO ORDERED.**

18 Dated: October 22, 2008

Elizabeth D. Laporte

ELIZABETH D. LAPORTE
United States Magistrate Judge